

Expert Determination¹

By
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As a number of recent court judgments have noted, Expert Determinations have become a popular method for determining disputes. In an expert determination, the decision maker decides an issue as an expert and not as an arbitrator. As Einstein J noted in *The Heart Research Institute Limited v Psiron Limited* [2002] NSW 646:

“In practice, Expert Determination is a process where an independent Expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.

...Unlike arbitration, Expert Determination is not governed by legislation, the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes...Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the *Institute of Arbitrators and Mediators of Australia*, the *Institute of Engineers Australia* or model agreements such as that proposed by Sir Laurence Street in 1992. Although the precise terms of these rules and guidelines may vary, they have in common that they provide a contractual process by which Expert Determination is conducted.”

More and more, disputants and their advisers prefer the Expert Determination process to the process of arbitration. The principal attraction of the expert determination is that usually, but not always, it avoids the interlocutory hearings that have become commonplace in

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arbitrations. Unfortunately, many arbitrations are now beset by interlocutory proceedings involving applications for particulars, discovery and interrogatories, all of which slow down the arbitral process and tend to equate arbitrations with curial litigation. Add to that, that questions of law arising in the arbitration can be raised by way of appeal to the courts of law, and the distinction between an arbitral hearing and an action in the ordinary courts is imperceptible in many cases.

Nonetheless, arbitration has several advantages over ordinary curial litigation: the parties select the arbitrator, get a quicker hearing and have their dispute decided in private. But an Expert Determination also has these advantages. And because the decision maker is acting as an expert and not as an arbitrator, the decision maker arguably has no obligation to hear evidence or submissions unless the terms of the appointment require that to occur. And, as I later indicate, the Expert Determination process has other advantages.

When I left the Bar in 1984 to go on the New South Wales Court of Appeal, expert determinations were seldom used outside the field of valuations and building and engineering contracts. Now they can be found in almost every area of law.

Three questions of practical importance arise in respect of Expert Determinations. First, what is the scope of an Expert Determination? That is to say, what is the Expert entitled to do? Second, in what circumstances will the courts hold that an Expert Determination is an attempt to oust the jurisdiction of the courts and therefore invalid? Third, in what circumstances will the courts set aside an Expert Determination on the ground that the Expert has made an error in reaching his or her decision? It is convenient to deal first with the third of these questions.

Despite their new-found popularity, Expert Determinations have a long history. And without understanding that history it is difficult – may be impossible – to fully appreciate some of the principal issues that still plague the field of Expert Determinations. Their origin was contracts of sale where the price of the property sold had been determined by a third party. In principle, there is no difference between the role of the valuer and the role of the expert asked to determine an issue. Both decide the issue by reference to their respective expertise. In the 17th and 18th centuries, a number of cases came before the English courts concerning contracts for the sale of land where the price of the land had been fixed by a third party. Two hundred and fifty years ago, the Court of Chancery stated that, if parties put their confidence in the skill and judgment of a valuer, they must abide by his judgment unless it plainly appears that "that he has been guilty of some gross fraud or partiality": *Belchier v Reynolds* (1754) 3 Keny 87 at 91. At the beginning of the 19th-century, Lord Eldon, one of the makers of the law of equity, said in *Emory v Wase* (1803) 8 Ves Jun 505 at 517:

"...if persons will enter into such an agreement to purchase at the valuation of another person, they must in ordinary cases be bound by that valuation: they must be taken to be judges of the discretion and skill of the person entrusted."

This statement accurately represented the position at common law. However, although a valuation or other determination made by an expert was binding at common law and the refusal to abide by it gave rise to an action for damages at common law, the Court of Chancery in some circumstances in the exercise its discretion would refuse to enforce a contract containing such a valuation or determination. It would refuse to

give the plaintiff the benefit of remedies that were the exclusive province of the Court of Chancery leaving the aggrieved party to his or her remedies at common law. For the benefit of the non-lawyers present or listening, I should point out that, until 1873 in England and as late as 1970 in New South Wales, the common law and the principles and rules of equity were administered as separate bodies of law in separate courts. Courts of Equity took account of the principles and rules of the common law but, relevantly for the present discussion, they also had an exclusive set of remedies which could be invoked in the Court of Chancery to supplement the remedies that were available for breaches of the law in the common law courts. The remedy of injunction is probably the best-known example. But in the present context, the remedy of specific performance, another exclusive remedy of the Court of Chancery, has played a central part in the development of the law concerning valuations and consequently expert determinations. The remedy of specific performance is the right to obtain the enforcement of a contract instead of an action for damages for its breach. But it is a discretionary remedy, and it does not follow that, because one party to a contract has defaulted, the Court of Chancery would, or modern courts exercising equitable jurisdiction will, automatically enforce the contract.

Hence, from an early stage in the development of this branch of the law, the judges of the Court of Chancery, in the exercise of their discretion, might refuse to enforce contracts where a sum payable under the contract depended upon the valuation or determination of a third-party. After Lord Eldon made the statement to which I earlier referred, his Lordship went on to say:

"If damages could be recovered in such a case, it does not follow, that the Court is in all cases bound specifically to perform the agreement to abide by the valuation..."

After reviewing the evidence in that case, Lord Eldon upheld the judgment at first instance where the Master of the Rolls had refused to order specific performance of a contract for the sale of a land where the defendants had claimed that the price of the land, fixed by a third party, was below its value. The Master of the Rolls had said: ((1801) 5 Ves Jun 846 at 848)

"Under these circumstances I am not bound to decree a specific performance; the more so because the Plaintiff has his remedy by action of law against Mr *Wase* and those, who were competent to make the agreement; and may recover damages..."

The result was that the defendants kept their land but were liable to pay damages at common law for their repudiation of the sale agreement. Thus, the contract remained on foot but the Court of Chancery would not exercise its exclusive jurisdiction to enforce it. The common and equity lawyers of the 19th century well understood the distinction between a contract that was valid and enforceable by an action for damages at common law and a contract that was valid but would not be enforced in the Court of Chancery. To them the distinction was the natural result of the different remedies in the two separate jurisdictions. As I will show, the failure of a later generation of judges to understand this distinction led for a time to some confusion as to the extent that the courts could interfere with expert determinations or valuations. And it may be that the legacy of that confusion is still with us.

Lord Eldon was a great and influential judge. It is not surprising that once he had declared that the Court of Chancery had a discretion to refuse

to enforce a contract dependent upon a valuation or other determination made by a third party that other Chancery judges would do likewise. Thus, in *Parken v Whitby* (1823) Turn & R 366, Sir Thomas Plumer, the Master of the Rolls, affirmed the right of the Court of Chancery to refuse specific performance of a contract if it thought that the sum fixed by a third party was erroneous. Inevitably, other judges attempted to define with more precision the circumstances in which the discretion to refuse specific performance ought to be exercised.

The seminal case is *Collier v Mason* (1858) 25 Beav 200 which has been much cited but which unfortunately led some later judges to misunderstand the circumstances in which a court would set aside a contract based on an expert determination. In *Collier*, the parties had agreed to the sale of a house and property at a price to be fixed by a designated person. The vendor resisted specific performance of the agreement on the ground that the price fixed was a gross undervalue the property. However, the trial judge, Sir John Romilly, ordered the contract to be specifically performed. His Lordship said:

“ Here the referee has fixed the price, which is said to be evidence of miscarriage, but this Court upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties of the contract; or... if the price was so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the Court would refuse to act on the valuation.”

Sir John Romilly enforced the contract despite saying that, although the valuation was very high and perhaps exorbitant, he could not say it amounted to evidence of fraud, mistake or miscarriage of justice.

In the 20th century, Sir John Romilly's mention of mistake or the valuer acting on a wholly erroneous principle led a number of judges to misunderstand the basis on which a court could interfere with a valuation or an expert determination. As I have indicated, the Equity judges made their statements about refusing to enforce contracts in the context of an action invoking the exclusive jurisdiction of the Court of Chancery to order a party to specifically perform the contract. They were not suggesting that mistake or erroneous application of principle meant that the contract was unenforceable in the ordinary courts of common law. On the contrary, one of the grounds upon which they refused to enforce the contract in the exclusive jurisdiction of Equity was that the plaintiff had a remedy at common law for the breach in the form of an action for damages.

By the middle of the 20th century, however, the separate jurisdictions of the common law courts and the equity courts had long disappeared everywhere except in New South Wales. Perhaps because they had forgotten this historical distinction, a number of judges came to believe that the courts of justice had power to set aside an expert determination or a valuation on the ground that the expert or the valuer had made a mistake or had applied erroneous principles in making the determination. It was a striking example of how lawyers will remove a statement of principle from its context and use it to achieve a purpose that is quite opposed to that which the originator of the principle intended.

Although the law concerning a valuation or other expert determination seemed settled for a century, in *Dean v Prince* [1953] Ch 590 Harman J effectively repudiated the settled law. In *Dean*, the articles of association of a company provided for the purchasing of its shares at a price to be certified by an auditor as fair value. The auditor stated that his valuation of a parcel of shares - which were a controlling interest in the company- was on the basis of the break up value of the assets. Harman J said (at 593-594) that the auditor had based himself "on an entirely wrong basis and has chosen to explain that basis". He made a declaration that the valuation was not binding upon the plaintiff, which meant that it was not even binding at common law. On appeal, the English Court of Appeal held ([1954] Chancery 409) that the auditor had not made any error. However, Denning LJ, one of the most influential judges of the 20th-century, said (at 427) that "... if the courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties". Denning LJ went on to say (at 427):

"It can be impeached not only for fraud but also for mistake or miscarriage. That was made clear by Sir John Romilly, MR in *Collier v Mason* 25 Beav 200, 204. For instance, if the expert added up his figures wrongly; or took something into account which he ought not to have taken into account, or conversely: or interpreted the agreement wrongly: or proceeded on some erroneous principle. In all these cases the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate."

In terms of legal principle, these statements were revolutionary, and they were supported by the remarks of another member of the Court of Appeal

in that case – Wynn-Parry J - who also relied on the judgment of Sir John Romilly in *Collier v Mason*. Neither Denning LJ nor Wynn-Parry J appeared to see any difference between the position at common law and the position in an action in the equity jurisdiction seeking specific performance of a contract based on a third party valuation or determination.

Nothing in the previous case law had indicated that the court would set aside a valuation or expert determination on the ground of mistake or any other error short of fraud or collusion. The previous case law had done no more than declare that, in certain circumstances, Equity would not lend its aid to the enforcement of such contracts. Indeed, 11 years after the judgment in *Collier v Mason*, Lord Romilly had said in *Weekes v Gallard* (1869) 21 LT 655 that the only defence to a suit for specific performance of a contract based on a valuation "would be fraud or collusion". He made no mention of mistake. And, naturally enough, he made no mention of the position in the common law courts.

The views expressed by Denning LJ and Wynn-Parry J in *Dean v Prince* were applied by Roskill J. in *Frank H. Wright (Constructions) Ltd v Frodoor Ltd* [1967] 1 WLR 506 in a case where a contract for the sale of a business provided that the price was to be that "certified by accountants acting as experts in the arbitrators". However Roskill J refused to set aside the contract in that case because the error was not one that materially affected the ultimate result. The views expressed in *Dean v Prince* were again applied in *Jones v Jones* [1971] 1 WLR 840 by Ungood-Thomas J in a case where an agreement required shares to be valued on a "going concern" basis but they had been valued on a break up basis. The judge said that, when a valuation was made on a specified

principle, the question was whether in all the circumstances in the case the principle was or was not wrong. I have no doubt that that case was correctly decided but not for the reasons that the learned judge gave. The correct basis of the decision in my opinion was simply that the valuation was not made in accordance with the terms of the contract which required the business to be valued on a going concern basis and not on the break up basis that had been used.

If the statements in *Dean v Prince* and the decisions following it had come to be regarded as accurately stating the law, it must be doubted whether expert determinations and valuations by third parties would have had the attraction that they presently have for the parties to many agreements. Every determination by an expert or valuer would have been open to re-assessment by the courts. The courts' capacity to interfere with an expert determination or valuation would have been much greater than the courts' powers to interfere with arbitral awards, for the expert determination could be set aside for errors of fact as well as other errors.

Surprisingly in 1973, nine years after he had given his decision in *Dean v Prince*, Lord Denning, by then Master of the Rolls, dramatically changed his view. In *Arenson v Arenson* [1973] Ch 346 at 362 - the case which held that valuers could be sued for negligent performance of their task - Lord Denning said:

“ Whenever two persons agree together to refer a matter to a third person for decision, and further agree that his decision is to be final and binding upon them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. They cannot reopen it for mistake or error on his part or for any reason other than for fraud or collusion.”

This was a return to the earlier law and reflected the views of Lord Romilly in *Weekes v Gallard* (1869) 21 LT 655 which were even more restrictive than the views expressed in *Collier v Mason*.

Lord Denning soon affirmed the view that he had expressed in *Arenson v Arenson* [1973] Ch 346 in *Campbell v Edwards* [1976] 1 WLR 403 where the English Court of Appeal held that a valuation bound the parties even though there was strong evidence indicating that the valuation represented a gross undervalue. Lord Denning said that, even if the valuer had made a mistake, the parties were bound by the valuation. Mysteriously, however, his Lordship said that, if on the face of the valuer's reasons or calculations it could be shown that they were wrong, the valuation might be upset. Given his other statements in this case, it is not easy to understand what he meant by this enigmatic statement. In *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175, the Court of Appeal applied the decision and reasoning in *Campbell v Edwards*. At this stage, the law concerning expert determinations and valuations appeared to have returned to the state that it had been in the long period between 1869 and 1953.

However, as so often happens in the development of legal doctrine, the courts went from one extreme to the other. In *Mayne Nickless Ltd v Solomon* [1980] Qd R 171 at 179, the Full Court of the Supreme Court of Queensland said that it was strongly inclined to view that a valuation, made by a valuer, chosen by the parties, was not impeachable for error or mistake. Then, in *Wamo Pty Ltd v Jewelled Foods Pty Ltd* [1983] ANZ Conv R 50, Clarke J, sitting in the Supreme Court of New South Wales, went further. His Honour said:

"My conclusion...is that valuations, whether speaking or non speaking, are not open to impeachment on the ground of mistake."

In reaching this decision, his Honour was much influenced by the fact that the courts had now held that a party to a contract, aggrieved by the valuation could sue the valuer for negligence in making his or her valuation. Clarke J thought that the remedy of the aggrieved party in the case of an erroneous valuation was to sue the valuer, not have the valuation set aside.

At the same time, however, the Victorian courts were taking a more restrictive and orthodox view of the circumstances in which a valuation or expert determination might be set aside. In 1983 in *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657, the Full Court of the Supreme Court of Victoria said that a valuation was not mistaken within the meaning of what Sir John Romilly had said in *Collier v Mason* simply because the valuation was open to serious criticism. The Full Court reversed the decision of the trial judge who had held that a valuation in question was invalid because it contained nine errors. One related to the use of comparable sales, five errors concerned the valuer giving too much or too little weight to particular factors, one error concerned the analysis by the valuer of comparable sales and the remaining two errors concerned matters of detail. Despite these errors, the Full Court upheld the valuation. Correctly, the Full Court said that the "mistake" to which Sir John Romilly was referring was a mistake of a kind which would enable a defendant to resist a suit the specific performance of a contract. The Full Court said (at 671): "Usually this is a bona fide mistake by the defendant as to the subject matter or terms or effect of the contract." One year later, the Victorian Full Court again held that a valuation could not be attacked

upon the ground that the relevant matters had been disregarded or irrelevant matters considered: *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16.

Two years after the decision of Clarke J in *Jewelled Foods Pty Ltd*, the circumstances which authorise a court to set aside a valuation or expert determination came before the New South Wales Court of Appeal for decision. The case was *Legal & General Life of Australia Ltd v A H Hudson Pty Ltd* [1985] 1 NSWLR 314, and it has played a significant part in the development of a law. I was a member of the Court of Appeal in that case. I think I can say without being accused of a lack of modesty that, with one exception, the statements of principle that appear in my judgment in that case have generally been accepted throughout Australia as representing the law on the subject. In *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405, 21 May (unreported) Palmer J said after referring to *Legal and General* that "these principles are now well settled" (para 48).

Legal & General Life of Australia Ltd was heard at first instance by Waddell J. His Honour set aside a valuation concerning the market rental of premises on the ground that, in determining the rental value, the valuer had acted on the basis that a mezzanine floor area was part of the rental premises. However, the lessee, with the lessors consent, had removed the mezzanine area at the commencement of the lease. Thereafter, it was simply vacant space, and Waddell J held that the valuer had erred by taking the mezzanine area into account in determining the rental. The Court of Appeal unanimously overruled his Honour's decision although the reasoning of the three members of the Court varied. Mahoney JA held that Waddell J erred in finding that the valuer had made the error in

which his Honour found. Priestley JA decided the case on the onus of proof holding that the plaintiff had not proved that the valuer had taken the mezzanine area into account. Like Mahoney JA, I found that Waddell J had erred in finding the error upon which his Honour had set aside the valuation. However, in the course of my judgment, I examined the relevant authorities to determine the circumstances in which an error would justify setting aside a valuation or determination. After reviewing the decided cases, I said (at 335):

“In my opinion the question whether a valuation is binding upon the parties depends in the first instance upon the terms of the contract, expressed or implied... A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct a conclusion to be drawn would almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that the valuation must be made honestly and impartially. It will be difficult, and usually impossible, however to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is "final and binding on the parties". By referring the decision to a valuer, the parties agreed to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. It is now settled that an action for damages for negligence will lie against a valuer on whom the parties have referred the question of valuation if one of them suffers loss as the result of the negligent valuation: *Sutcliffe Thackrah* [1974] AC 727; *Arenson v Arenson* [1977] AC 405. But as between the parties to the main agreement the valuation can stand even though it was made negligently. While the mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the

agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract."

The decision of the Court of Appeal was upheld by the Judicial Committee of the Privy Council but, as their Lordships thought that the valuer had not made any error of fact or law, it was unnecessary for them to say anything concerning the principles upon which a valuation could be set aside.

At this point, it is convenient to deal with the first of the questions to which I earlier referred. What is the scope of an Expert Determination? That is to say, what is the Expert entitled to do? In *Triarno Pty Limited v Triden Contractors Limited* NSWSC, 22 July 1992 (unreported) Cole J held that failure to specify a procedure to be adopted by the Expert did not necessarily void an agreement to enter into an Expert Determination process. His Honour said:

"Whilst recognising that there may be utility in the court determining procedures to be followed in an expert determination, in my opinion the court has no jurisdiction to do so...if the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the court can fill. There is no reason to imply a term that the court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed." (at 5)

Most Expert Determinations state that the Expert is to determine the relevant issue as an expert and not as an arbitrator. Such statements have commonly been found in agreements since 1852 and were designed to ensure that the determination did not fall within the scope of the *Common Law Procedure Act* enacted in that year. Most Expert Determinations also expressly state that the determination of the expert is final and binding on the parties. And, subject to a term to the contrary, Expert Determinations also contain an implied term that the expert will determine the relevant issue honestly and impartially: *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175 at 181; *Legal & General Life of Australia Ltd v A H Hudson Pty Ltd* [1985] 1 NSWLR 314 at 335. Furthermore, the English Court of Appeal has held that, subject to the contract, an Expert Determination is determined by the expert applying his or her own expertise and deciding the issue on the basis of his or her expert opinion: *Palacath v Flanagan* [1985] 2 All ER 161 at 166. But in acting as an expert and acting honestly and impartially to determine the issue in accordance with the contract, to what extent is the expert required to take into account the body of relevant expert opinion in cases where his or her expert opinion is at odds with the majority opinion in that field? Two illustrations – one from medicine and one from law – illustrate the problem.

Fifty years ago, Dr Brian Haines, a prominent Sydney physician, expounded the theory that in certain situations emotional stress could cause the development of cancer. He did not claim that emotional stress itself caused cancer but that in association with other factors it could. He conceded that no other medical expert agreed with his opinion. Fifty years later, while the relationship between stress and cancer has not been scientifically proven, there appears to be a growing body of medical

opinion in favour of the view that such a causal connection may exist. In 1961, the High Court of Australia held (*Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292) that, despite the unanimous medical opposition to Dr Haines' view, it was open to a jury to accept Dr Haines opinion that, in the circumstances of the particular case, there was a causal connection between the emotional disturbance associated with the plaintiff's injuries for which the defendant was responsible and the onset of the cancer which killed him.

If Dr Haines had been asked as an expert to determine whether there was a causal connection between the onset of the cancer and the plaintiff's injuries, could a court set aside his affirmative determination of that issue on the ground that it was not made in accordance with the contract because the unanimous weight of expert opinion was to the contrary? I find it difficult to see how a court could do so. The determination would represent the doctor's honest, expert opinion, and the parties, having agreed that his determination was final and binding, must be taken, in the words of Lord Eldon, to be bound by that determination because they must be taken to have relied on the discretion and skill of the doctor. If I am right in thinking that the parties are bound by the determination, it must follow that a determination cannot be set aside on the bare ground that it is against the overwhelming weight of expert opinion or is unreasonable having regard to other expert opinion. It must also mean that an expert is entitled to decide the relevant issue in accordance with his honest opinion even though the expert knows that most, if not all, other experts would disagree with his or her determination.

Legal problems submitted for expert determination frequently raise a similar problem. For example, there may be a decision of an intermediate

appellate court which would be binding on a first instance judge and which an arbitrator could not disregard without committing an error of law but which an expert lawyer thinks is wrong. Is the expert lawyer acting in accordance with the contract of Expert Determination if he or she refuses to apply the intermediate appellate decision? The hierarchical nature of the court system and the doctrine of precedent mean that a court or other body bound by a judicial decision must apply it. But that does not mean that the decision is correct or represents the law. After all, a judicial decision is nothing more than strong evidence of what the law is. I find it difficult to accept that the expert is not acting in accordance with the contract in a case where the expert believes that the ultimate appellate court in the jurisdiction will overturn the intermediate appellate court decision.

Imagine a legal expert in 1931 asked to determine whether a manufacturer owed a duty of care to a customer of a retailer who bought the manufacturer's goods. In 1931, there was no case establishing such a duty and a good deal of dicta in various cases that suggested that the manufacturer did not owe such a duty of care. I find it difficult to accept that the legal expert would not have acted in accordance with the Expert Determination if he or she had determined, as the House of Lords did in 1932 in *Donoghue v Stevenson* [1932] AC 532, that the manufacturer did owe such a duty.

Indeed, in some cases I think the expert is acting in accordance with the Expert Determination agreement even though his or her determination is contrary to a decision of the ultimate appellate court in the jurisdiction. Suppose that fifty years ago, the High Court of Australia had expressed a legal principle in a narrow way but courts of high authority in other

jurisdictions and academic writers had later expressed the principle in wider terms. If the expert determiner believes that the High Court stated the principle too narrowly 50 years ago and would now state it in broader terms, is the expert determiner acting in accordance with the contract when he or she applies the wider statement of the principle? Although no doubt the issue is controversial, my own view is that the expert determiner is entitled, as an expert, to apply the wider principle which in his expert opinion represents the true state of the law.

Associated with the problem of the Expert Determiner acting contrary to generally accepted opinion or established authority is the issue of natural justice. Must the Expert inform the parties that he is intending to apply a minority view? It is, I think, still an open question whether the rules of natural justice apply generally to expert determinations. The fact that the person determining the issue acts as an expert and not as an arbitrator points against the rules of natural justice being generally applicable to expert determinations. That is because the decision maker is perceived to be not acting judicially or quasi judicially but as deciding the issue in question in accordance with that person's own expertise without any obligation to hear the parties. Nevertheless, in an expert determination, the expert is deciding an issue that affects the rights and obligations of the parties to the agreement. In a case where the expert is required to receive submissions from the parties, there is, I think, a strong case for saying that the Expert Determination is analogous to a quasi-judicial inquiry and that the rules of natural justice apply to such an expert determination.

Traditionally, the rules of natural justice have not been seen as generally applying to a valuer or other expert making an expert determination. One matter that has frequently been seen as important, if not decisive, is

whether in substance the expert is an arbitrator deciding a dispute between parties or whether the expert's role is that of an assessor, investigator or appraiser. At least two Victorian cases hold that the fact that the parties expressly state that the "expert is not an arbitrator of the matters in dispute and shall not be deemed to be acting in an arbitral capacity" is not conclusive of the question: *Ajzner v Cartonlux Pty Ltd* [1972] VR 919; *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307. However, I regard the validity of the statements in these cases as open to serious doubt. The fact that the parties have expressly agreed that the decider is acting as an expert and not as an arbitrator seems almost conclusive evidence that the person was not conducting a judicial or quasi-judicial inquiry. If, however, there is no stipulation that the expert is not acting as an arbitrator and is deciding a dispute between parties, it may well be correct to conclude that the expert's function is in reality to conduct a quasi-judicial inquiry. In that case, then, unless the Expert Determination indicates the contrary, the rules of natural justice will apply. The seminal case is *Re Carus Wilson and Greene* (1886) 18 QBD 7 where the English Court of Appeal had to determine whether an umpire who had to make a valuation when two valuers disagreed was an arbitrator. The decision turned on whether the umpire was bound by the rules of natural justice. Lord Esher MR said (at 9):

"If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon the evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have

arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances. I think that this case was clearly not one of arbitration, and that it falls within the class of cases where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any disputes."

The issue was comprehensively examined in the Supreme Court of Queensland by McPherson J at first instance and by the Full Court of that Court in *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8. *Capricorn* was a case where the parties had agreed that the defendant had supplied defective printing varnishes to the plaintiff in breach of contract and that they would resolve their dispute with respect to the quantum of damages by jointly instructing a firm of accountants to investigate and assess damages. The plaintiff agreed that it would cooperate fully in the investigation and that the accountants' assessment would constitute a final settlement of the dispute. Subsequently but without the defendant's knowledge, the plaintiff's accountant presented a greatly increased claim to the firm of accountants which they accepted as the appropriate quantum. The plaintiff applied to the court to have the assessment treated as an award under the *Arbitration Act 1973* (Queensland) and for judgment. The defendant applied to have the accountants' decision set aside under the *Arbitration Act* for misconduct. McPherson J said (at 15) that:

"the existence of a dispute, although a factor, is not necessarily a decisive factor in determining whether arbitration or appraisal is involved. It is quite possible for parties to become involved in a dispute about something, such as the value of premises or goods, which they agree to submit for appraisal without intending that an arbitration should follow. The distinction depends upon a range of factors of varying importance and weight depending

on the circumstances; but generally what must be in contemplation is that there will be ‘an inquiry in the nature of a judicial inquiry.’”

On appeal, the Full Court held ([1989] 1 Qd R 22) that the accountants were acting as experts not as arbitrators. However, they concluded that the accountants had acted in excess of their function by receiving and acting upon the further claim from the plaintiff’s accountants. They had been appointed to consider the claims set out under the heads of damages in a particular letter and not other claims that might subsequently be presented by only one side. The defendant's appeal was therefore allowed. The Full Court thought that relevant factors were the nature of the inquiry and the fact that the appointment was to a firm of accountants rather than to a specific named person as would be required for an arbitrator. The accountants were to make an inquisitorial inquiry rather than an adversarial one, and the court thought that the parties had no right to be heard by the accountants. Thomas J thought the function of the accountants all-important. He said that the arbitral function is to hear and resolve the opposing contentions of the parties while an appraisal or expert decision is typically an appraisal in monetary terms of property value, or of loss or damage, made through specialist knowledge, or skills without any requirement of first hearing the parties.

More recently, Einstein J. looked at this problem in *Enron Australia Finance Pty Ltd (in Liquidation) v Integral Energy Australia* [2002] NSWSC 753. His Honour said:

“111 It is plain that when one is examining the conduct of a judicial or quasi-judicial hearing there is an expectation of impartiality and adherence to procedural fairness (or what was formerly referred to as natural justice).

112 However, where what is involved falls outside the realm of judicial or quasi-judicial determination, the issue is whether the principle of procedural fairness can be or should be maintained...

113 It is of assistance to address this issue by first asking whether the Reference Market-maker's task is to be seen as that of an arbitrator, ie. a quasi-judicial determination which will automatically invoke the principles of impartiality, or whether the task is merely that of an expert, valuer or appraiser."

I have sought to examine the issues thrown up by the examples of the medical and legal problems and the issue of natural justice by reference to the terms of the contract and the status of the expert giving his or her honest opinion. However, the best solution is for the advisers to the parties to deal with these potential problems by stipulations in the contract setting up the Expert Determination. Indeed, those called upon to make expert determinations would be well advised to insist on the Expert Determination agreement containing provisions that deal with these problems.

Since the decision in *Legal & General Life of Australia Ltd*, many cases concerning expert determinations and valuation have come before the Australian courts. As I there indicated, the courts have generally accepted that that the critical question is: Was the determination made in accordance with the terms of a contract? If it was, it is nothing to the point that the determination may have proceeded on the basis of error or that it has resulted in too high or too little a sum of money. Nevertheless, as Mason P correctly pointed out in the New South Wales Court of Appeal in *Holt v Cox* (1997) 23 ACSR 590 at 596:

"A close reading of McHugh JA's judgment in *Legal & General* indicates that his Honour was not propounding the view that a valuation will stand regardless of error. Rather he was making the point that mistake is not itself a ground of vitiation..."

Mason P went on to say that nevertheless, the mistake may be of such a nature that the Expert has not made a determination in accordance with the expert determination agreement. As Nettle JA has pointed out (*AGL*

Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd [2006] VSCA 173, the mistake may “be of such a nature that the resultant determination is beyond the realm of contractual contemplation - beyond anything which the parties may be supposed to have intended to be final and binding - and therefore susceptible to review.”

All the cases decided since *Legal & General* recognise that the critical question is whether the determination was made in accordance with the contract. But there are a number of judicial statements which are at odds with my statement in that case that “as between the parties to the main agreement the valuation can stand even though it was made negligently.” Thus, in *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1998) 15 BLC 49 at 57 under a building contract the proprietor had power to determine the value of variations in its sole discretion. Anderson J, sitting in the Supreme Court of Western Australia, said that the implied terms of the contract included terms that the proprietor was “bound to act honestly, reasonably and within power”. On appeal to the Full Court, Ipp J said (1999) 20 WAR 489 at 510 that “the determination can be challenged on the ground was directed to the [expert’s] obligations to act honestly, bona fide and reasonably, or on any other ground on which it can be said that the valuation was not in accordance with the contract, in the sense explained by McHugh JA in *Legal & General*”. In *Renard Construction (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, Priestley and Handley JJA took the view that a construction contract contained an implied term that a principal exercising a power to take over the site and exclude the contractor must act reasonably. Meagher JA, and Cole J at first instance, did not agree that the principal was under such an obligation. The power of the principal under such a contract is different from the obligation of the expert in a Determination. But *Renard*

Construction does illustrate the readiness of courts to imply terms of reasonableness. In *Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co* (unreported, Supreme Court, NSW, 12 February 1998), Rolfe J said that he had some difficulty with the proposition "that notwithstanding that a valuation was made negligently, or in mistaken application of principles of valuation, it will none-the-less be made in accordance with the terms of the contract." In making this statement, Rolfe J was commenting on a passage in the judgment of Santow JA in *Holt v Cox* where his Honour said that, if the contract makes the decision of the valuer final and binding on the parties, "a valuation made in accordance with terms of the contract will be binding as between the parties, even if made negligently, or in mistaken application of the principles of valuation including failing to consider relevant matters or mis-valuing the asset." In *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173, Nettle JA drew a distinction "between an error in the exercise of a judgment, opinion or discretion entrusted to an expert, and an error which involves objective facts or a mere mechanical or arithmetical exercise." His Honour said that, "[s]ubject to the contract in question, it is easier to suppose the parties to a contract contemplated that an error of the former kind be beyond the realm of review than it is to think that they intend to be fixed with errors of objective fact or in processes of mechanical calculation."

Given the differing judicial views as to whether a contract for expert determination contains an implied term that the expert will act reasonably, it is impossible to say whether what I said in *Legal & General* can be regarded as accurately stating the law. Courts are very ready to imply terms of a party or other person will act reasonably. And there is a natural judicial reluctance to uphold a decision which is

regarded as unreasonable. On the other hand, as the Court of Appeal has pointed out in *Holt v Cox*:

"The readiness in the courts to provide greater latitude and experts to choose between different valuation methods and, within limits, to make errors in assessing facts or taking matters into consideration or declining to take matters into consideration is influenced by the recognition... that experts who negligently determine a valuation will be held liable in damages to a party suffering loss in consequence of the expert's negligence."

I now turn to the second of the two questions to which I referred at the beginning of this speech: in what circumstances will the courts hold that an Expert Determination is an attempt to oust the jurisdiction of the courts and therefore invalid?

There have been a number of attempts to persuade courts that the terms of an Expert Determination are an attempt to oust the jurisdiction of the ordinary courts of justice and are therefore void as being against public policy. On the whole, these attempts have proved unsuccessful.

Nevertheless, one cannot help but feel that a special exception is being made in respect of Expert Determinations. As A. Berg points out in "Ousting the Jurisdiction" (1993) 109 LQR 35 at 36, *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478 and *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 establish that public policy permits the parties to a contract to make a domestic tribunal the final arbiter of disputes concerning questions of fact arising under the contract. However, those cases also show that public policy will not permit a domestic tribunal to finally determine questions of law arising under a contract. And in this context, questions of law include questions concerning the construction of and meaning of documents. Yet with the exception of the judgment of Heenan J in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1997) 14 BCL 277, the courts have consistently held

that Expert Determinations do not oust the jurisdiction of the courts although they frequently make the Expert's opinion final and binding on the parties on all matters – including those which inevitably involve questions of law.

The issue came before Rolfe J in *Fletcher Construction Australia Limited v MPN Group Pty Limited* NSWSC, 14 July 1997 (unreported) In *Fletcher Construction*, Rolfe J declared (at 18) that the Expert Determination clause in question

"does not purport to oust the jurisdiction of the Court. It is an agreement between the parties that the specified disputes shall be determined by an expert. There is nothing unusual about such a provision and parties are held to their bargain if they agree to such a clause. Nor is there anything unusual about the clause providing that the expert's decision shall be "final and binding" or "conclusive", and provisions such as that do not oust the jurisdiction of the Court.

Rolfe J said there is a distinction between agreeing not to invoke the jurisdiction of the Courts and agreeing that some matters on which the Courts might otherwise be required to adjudicate should be determined by a third party. The latter agreement leaves the enforcement of the rights of the parties under the contract, including the dispute resolution clause, to the Courts and consequently does not oust the jurisdiction of the Court. There is no ouster because such an agreement is merely limiting the matters for consideration by the Court to the question of whether the agreed Expert has acted within the scope of the agreement between the parties. Thus, provided

that the Expert acts within the scope of the dispute resolution clause, the Court will enforce his or her decision as final and binding (at 15). Similar conclusions were reached by the Supreme Court of Victoria in *Badgin Nominees Pty Limited v Oneida Limited* [1998] VSC 188, Gillard J (unreported).

The most comprehensive judgment on the subject is that of Einstein J in *The Heart Research Institute Limited v Psiron Limited* [2002] NSW 646 where all the Australian cases on the subject up to that time are reviewed.

The present state of the law is summarised in the judgment of Wheeler JA in the Court of Appeal of the Supreme Court of Western Australia in *Straits CAP exploration (Australia) Pty Ltd & Anor v Murchison United NL & Anor* [2005] WASCA 241 where her Honour said:

“The effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider. Prior to the conclusion of the expert determination procedure - that is, prior to the making of a determination - any party to a contract containing such a clause remains free to sue upon the contract, unless the contract itself makes compliance with some form of dispute resolution procedure a condition precedent to the enforcement of rights under the contract. In relation to the latter type of contract, the effect of the clause is not to invalidate an action brought in breach of it, but to provide a defence and to 'postpone' but 'not annihilate the right of access to the Court'.”

Conclusion

Expert Determinations are now a well established and increasingly popular method of alternative dispute resolution. It seems likely that that

will continue to be the position, particularly as the resolution of legal disputes becomes increasingly privatised. No doubt the ingenuity of lawyers and others experienced in the field will lead to further refinement in the role of the Expert in making these Determinations. One suggestion that has been made to me is that, at least in cases concerned with technical subject matters, the Expert Determination agreement should provide for the Expert to submit a draft of the determination to the parties for their comment. The object of this suggestion is that it enables the parties to be sure that the Expert has understood the technical aspects of the Determination. This seems a suggestion worthy of consideration by the parties to Expert Determinations concerned with technical subject matters. There is always a risk that, if a legal expert is dealing with a technical subject, he or she may fall into error by misunderstanding some of the finer points of the subject. Similarly, there is always a risk that a non-lawyer dealing with a technical subject may misunderstand legal principles or issues that are fundamental to the determination. On the other hand, requiring the Expert to follow a set of procedures risks losing the speed and flexibility which Expert Determinations presently enjoy and which are generally perceived to give them an advantage over the arbitral process.